(1)

Supreme Court, U.S.
FILED

No. 01-159 JUL 19 2001

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES AND MILLIE SHARRIEF
Personal Representatives for
Quanetta Buchannon, deceased,

Petitioners,

vs.

REBECCA GERLACH, M.D.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI to the
SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Sherryl Snodgrass Caffey
Counsel of Record
200 West Side Square
Suite 55
Huntsville, Alabama 35801
(256) 551-0333

77PP

QUESTIONS PRESENTED

1. **Does the Alabama Supreme Court's finding that the "improper matter [considered by the jury] must have been obtained by the jury or introduced to it by some process outside the scope of the trial," which permits the jury to consider: facts not admitted as evidence, facts which violate jury instructions, and facts which clearly show violations of the United States Constitution, and Federal and State law which are introduced by the jurors themselves during their deliberations, violate Petitioners' Constitutional rights to due process, equal protection and/or a fair and impartial trial?**

   A. In this case the jurors discussed and considered the *race* (African American) of Petitioners, their deceased daughter, and their counsel; the *religion* of Petitioners (Muslim); and *sex* related issues concerning the morality of their deceased unwed daughter (who was the mother of two children) in deciding their verdict. The foregoing discussions influenced the jurors to vote more favorably for Respondent, and to reach a verdict in her favor and against Petitioners.

ISSUE: **Does the Alabama Supreme Court's holding that "matters (concerning race, religion and/or sex) that the jurors bring up in their deliberations are simply not improper under**

Alabama law, because the law protects discussions of jurors and statements they make while deliberating their decision" violate Petitioners' Constitutional rights to due process, equal protection and/or a fair and impartial trial?

B. In this civil case, the jurors discussed, debated and voted to criminally indict Ms. Buchannon's OB/GYN, who was not a party in the case at hand. They also discarded the legal definition of standard of care provided to them in the trial court's jury instructions and fashioned their own, to wit: "The doctor is supposed to do whatever he or she thought was necessary to keep the patient from further harm." The foregoing discussions influenced the jurors to vote more favorably for Respondent and to reach a verdict in her favor and against Petitioners.

ISSUE: **Did the Alabama Supreme Court err in holding that the jurors' discussions and debates - - concerning criminally indicting the OB/GYN doctor and fashioning and using their own definition of the standard of care - - did not constitute the jury's consideration of extraneous facts, nor reversible error.**

2. **Did the Alabama Supreme Court err in holding that: "The record contains substantial evidence to support the jury verdict; thus, we must conclude that the verdict was not plainly and palpably wrong"**

3. **Did the Alabama Supreme Court err in finding that the record did not contain Petitioner's objection to the jury venire of 36 members, containing only one African American, and in not considering said objection?**

4. **Did the Alabama Supreme court err in finding that Petitioners made no objections at trial to the exclusion of Petitioners' Exhibits 5 and 7?**

LIST OF PARTIES

PETITIONERS: **CHARLES SHARRIEF and MILLIE SHARRIEF,** ***Personal Representatives of Quanetta Buchannon. deceased***

RESPONDENT: **REBECCA GERLACH, M.D.**

TABLE OF CONTENTS

QUESTIONS RESENTED..... i

LIST OF PARTIES..... ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT..... 7

CONCLUSION..... 10

INDEX TO APPENDICES

APPENDIX A: SUPREME COURT OF ALABAMA OPINION

APPENDIX B: TRIAL COURT ORDER denying post-judgment motions

APPENDIX C: TRIAL COURT ORDER setting hearing on post-judgment motions and responses

APPENDIX D:	**TRIAL COURT'S ORDER quashing subpoenas for depositions of jurors**
APPENDIX E:	**PETITIONERS' MOTION TO ALTER, AMEND, OR VACATE THE JUDGMENT, *or in the alternative*, MOTION TO TAKE DEPOSITIONS OF JURORS and MOTION FOR ENLARGEMENT OF TIME**
APPENDIX F:	**PETITIONERS' MOTION TO VACATE THE JUDGMENT, *or in the alternative*, MOTION FOR NEW TRIAL and MOTION FOR POST-JUDGMENT HEARING and RENEWAL OF MOTION TO TAKE DEPOSITION TESTIMONY OF JURORS**
APPENDIX G:	**JURY VERDICT & JURY JUDGMENT**
APPENDIX H:	**STANDARD OF CARE CHART reprinted from pp. 15-19 of Petitioners' Appellate Brief in the Alabama Supreme Court**
APPENDIX I:	**PETITIONERS' TRIAL EXHIBIT 5**
APPENDIX J:	**PETITIONERS' TRIAL EXHIBIT 7**

TABLE OF AUTHORITIES CITED

ALABAMA

Statutes

Code of Alabama, 1975, Title 12-21-12 10

Constitution of Alabama of 1901, Art. I, Sec. 11....3, 8

Other

Dixon v. State, 27 Ala. App. 64, 167 So. 340..... 3
(1939)

Jefferson County v. Kellum, 630 So. 2d 426..... 7
(Ala. 1993)

Whitten v. Allstate Ins. Co., 447 So. 2d 655..... 7
(Ala. 1994)

FEDERAL

Statutes

Frst Amendment to the U. S. Constitution.....1, 8

Fifth Amendment to the U. S. Constitution.....2, 9

Sixth Amendment to the U. S. Constitution.....2, 8

Seventh Amendment to the U. S. Constitution..... 2, 7

Fourteenth Amendment to the U. S. Constitution.. 2, 9

42 U.S.C. Section 1983.....3, 9

28 U.S.C. Section 1257(a).....1

Other

Brown v. United States, 411 U.S. 223, 231-232.....8
(1973)

Edmonson v. Leesville, 500 U.S. 614, 114 L. Ed.....9
2d 660 111 S. Ct. 2077 (1991)

McDonough v. Greenwood et al., 464 U.S. 548,..... 8
104 S.Ct. 845, 78 L. Ed. 2d 663

Smith v. Phillips, 455 U. S. 209, 217 (1982).....8

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is currently unreported and is set out at Appendix ["App . "] A hereto. The Order of the state trial court denying Petitioners post-judgment relief is set out at App. B. The Order of the trial court setting Petitioners' post-judgment motions and Respondent's post-judgment motions on April 5, 2000 is set out at App. C. The Order of the trial court quashing Petitioners' subpoenas for depositions of the jurors is set out at App. D. The jury verdict and trial court Judgment are set out at App. G.

JURISDICTION

The Judgment of the Supreme Court of Alabama was entered on April 20, 2001. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Title 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *First Amendment to the United States Constitution,* which provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

The *Fifth Amendment to the United States Constitution*, which provides, in pertinent part: "No person shall be ... de deprived of life, liberty, or property, without due process of law ..."

The *Sixth Amendment to the United States Constitution*, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State"

The *Seventh Amendment to the United States Constitution*, which provides, in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ..."

The *Fourteenth Amendment to the United States Constitution*, which provides, in pertinent part:

> **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

42 U.S.C. 1983, which provides in pertinent part:

> **Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any state ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...**

The *Constitution of Alabama of 1901, Art. I, Sec. 11* states: "That the right of trial by jury shall remain inviolate," together with Alabama case law, to wit: *Dixon v. State, 27 Ala. App. 64, 167 So. 340 (1936)* which mandates that the jury shall be impartial.

STATEMENT OF THE CASE

This is a request for review of the April 20, 2001 Decision by the Alabama Supreme Court affirming the trial court's judgment for Respondent physician in a wrongful death suit brought by Petitioners as personal representatives of their daughter, Quanetta Buchannon, deceased. Ms. Buchannon was nineteen years old at the time of her death.

On July 2, 1993 at 9:05 p.m., Quanetta Buchannon (African American) presented in the Jackson County Hospital emergency room five days after delivering her second child complaining of various medical problems. Ms. Buchannon was examined by Respondent ER physician, Rebecca Gerlach (White), who incorrectly diagnosed that she had endometritis, and then discharged her, although tests results known to Dr. Gerlach at the time indicated that she had a life-threatening infection and she was severely dehydrated; and although the standard of care required admission into the hospital and IV broad spectrum antibiotics with anaerobic coverage and IV fluids. In fact, according to Gerlach, a white blood count with a left shift and 4% bands is significant in diagnosing the medical condition of patients. The test results of Ms. Buchannon's white blood count showed a left shift with 77% bands, which was so abnormal that Dr. Gerlach's expert, Dr. Sherry Squires, termed the same "bizarre." Ms. Buchannon died within eight (8) hours of being discharged by Respondent from the emergency room of Jackson County Hospital.

The Sharriefs admitted the following evidence at trial: Ms. Buchannon's medical records; the Alabama Department of Forensic Sciences Autopsy Report showing that death was caused by septic shock; Certificate of death showing that death was caused by septic shock; a treatise titled Emergency Medicine by Judith E. Tintinalli ... which stated therein that the recommended treatment for endometritis, Gerlach's diagnosis, was admission into the hospital and the administration of IV broad spectrum antibiotics with anaerobic coverage; the testimony of Dr. William Garrett (Sharriefs' expert], the testimony of Dr. Sherry

Squires (Gerlach's expert), and the testimony of Dr. Gerlach, herself - - all of which clearly showed that Gerlach had breached the standard of care. Their testimony regarding the standard of care and Gerlach's medical evaluation, treatment and discharge is summarized in the chart set forth at App. H. and in Appellant's briefs. Additionally, Dr. Giddens, Ms. Buchannon's OB/GYN, testified in rebuttal to Gerlach's claims that he was responsible for Ms. Buchannon's treatment and discharge. Additionally, both Gerlach and Giddens testified that Gerlach did not consult with him, nor present the patient with him; and that Gerlach did not tell him about any of the abnormal test results.

At the trial of this matter, the Sharriefs timely raised a *Batson* objection to the jury venire containing one African American out of 36 veniremen. Trial Court Transcript, pp. 5-7 Said objection was overruled, and their case was ultimately tried by an all white jury.

Additionally, the Sharriefs objected to the trial court's exclusion of their Exhibits 5 and 7, and preserved the same for appellate review. Trial Court Transcript, R 186, 223 Said adverse rulings are set out in the Sharriefs Appellate Brief, p. 36 in a Summary of Rulings Adverse to the Sharriefs.

During their deliberations, the jury discussed and considered the race (African American) of the Sharriefs, their deceased daughter, and their attorney; the religion (Muslim) of the Sharriefs; and sex-related issues, to wit: the fact that Ms. Buchannon, who was not married, had two children; and they based their verdict upon the same.

Additionally, contrary to the jury instructions on the legal definition of standard of care, the jurors ignored the same and fashioned their own definition during their deliberations, and found that Respondent had complied with their definition of the standard of care. The jurors also voted to indict the OB/GYN doctor, who was not a party in this civil trial.

Upon learning of the foregoing unlawful discussions from one of the jurors, the Sharriefs filed subpoenas for the jurors to appear for depositions; however, Gerlach objected thereto, and the trial court quashed said subpoenas. App. D

Thereafter, the Sharriefs filed a Motion to Alter, Amend or Vacate the Judgment (quashing the subpoenas), or in the alternative, Motion to Take Depositions of Jurors and Motion for Enlargement of Time App. E; and a Motion to Vacate the Judgment, or in the alternative, Motion for New Trial and Motion for Post-Judgment Hearing and Renewal of Motion to Take Deposition Testimony of Jurors, which was supported by Affidavits from Charles Sharriefs; App. F-18, F-19 and two jurors, Jane Stump; App. F-14, F-15 and James Headrick. App. F-16. F-17; and the aforesaid Treatise excerpt. F-20

Both motions raised the Constitutional questions presented herein. The trial court entered its Order setting the foregoing motions, and Respondent's responses thereto, for a hearing on April 5, 2000. App. C Thereafter, the trial court entered its Order at App. B, striking the aforesaid juror affidavits; denying Petitioners' motion to take juror depositions; finding that Petitioners "had available to them the opportunity to offer affidavit or live juror testimony at the hearing"; and denying Petitioners' motion to vacate the judgment or, in the alternative, for a new trial.

The Sharriefs timely appealed the jury verdict and the trial court's denial of their post-judgment motions. Said appeal raised the Constitutional questions presented herein in Issues 1. And 5 of their Appellant Brief, and in the appeal forms.

On April 20, 2001, the Alabama Supreme Court entered its Opinion affirming the judgment of the trial court, and addressing Petitioners' Constitutional issues raised herein. App. A

REASONS FOR GRANTING PETITION

The Alabama Supreme Court's decision affirming the trial court's Decision and post-judgment Orders violates its decision in *Jefferson County v. Kellum*, 630 So. 2d 426 (Ala. 1993), citing *Whitten v. Allstate Ins. Co.*, 447 So. 2d 655 (Ala. 1984), to wit:

> **Juror misconduct will justify a new trial when an affidavit, oral testimony, or deposition indicates that the misconduct resulted in bias or corruption or that the misconduct affected the verdict, or when, from extraneous facts presented by affidavit, testimony, or deposition, prejudice may be presumed as a matter of law.**

In the instant case, Petitioners sought to show juror misconduct, which resulted in bias and violations of their Constitutionally protected rights to due process, equal protection and a fair and impartial trial by jury, through the use of juror affidavits and oral and deposition testimony. However, the trial court quashed the subpoenas for juror depositions,

App. D; struck the juror affidavits of Stump and Headrick, App. B; and denied the taking of juror Affidavits, Deposition and/or oral testimony, then ruled that the Sharriefs had the opportunity to present the jurors' testimony. App. B

The trial court's Order at App. C set all motions to be heard on the same day, April 5, 2000. Accordingly, the trial court's ruling that "The Plaintiffs had available to them the opportunity to offer affidavit or live juror testimony at the hearing" is clearly erroneous, as such opportunity was thwarted by the trial court setting their motion to present the oral, deposition and affidavit testimony of the jurors to be heard at the hearing wherein such testimony was requested, thereby making it impossible to subpoena jurors, and by the trial court striking the juror affidavits and denying the requested juror depositions and oral testimony in its Order entered on May 1, 2000, almost a month after the hearing.

The Alabama Supreme Court's decision affirming the trial court's Judgment and post-judgment Orders violates Petitioners' Constitutionally protected right to a trial by a fair and impartial jury, as guaranteed by the 1st, 6th and 7th Amendments to the United States Constitution and by Article 1, Section 11 of the Constitution of Alabama of 1901 ... Further, this Court has long held that "a litigant is entitled to a fair trial ..." *McDonough v. Greenwood et al.*, quoting *Brown v. United States*, 411 U.S. 223, 231-232 (1973) Additionally, in *Smith v. Phillips*, 455 U.S. 209, 217 (1982), this Court ruled: "One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.'" Accordingly, the jurors' debates and discussions as set forth herein clearly indicate that they did not decide this case solely on the evidence

before them; and that they were not impartial triers of fact.

The Alabama Supreme Court's decision affirming the trial court's Judgment and post-judgment Orders violates Petitioner's' Constitutionally protected rights to due process and equal protection, as guaranteed by the 5th and 14th Amendments to the United States Constitution and by 42 U.S.C. Sec. 1983. In *Edmonson v. Leesville*, 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991), this Court held that racial discrimination in a civil litigant's exercise of peremptory challenges of jurors violates equal protection. The Sharriefs request herein that this Court extends this ruling to include race, religion, sex, etc., discrimination, which is demonstrated by the jurors through their deliberations.

The Alabama Supreme Court's decision affirming the trial court's Judgment and post-judgment Orders is clearly erroneous in that the Sharriefs did raise a *Batson* objection to the jury venire; and objections to the exclusion of their Exhibits 5 and 7. Additionally, said ruling severely prejudiced them in that the all-white jury demonstrated bias against them and their counsel; and Exhibit 5 set forth at App. I consisted of Gerlach's medical records with Garrett's high-lighted annotations of her breaches of the standard of care thereon; and Exhibit 7 set forth at App. J showed that the concentration of Rocephin administered IM (intramuscular (as given by Gerlach to Buchannon) peaks faster than administered through IV. Both of these Exhibits contained critical evidence in support of the Sharriefs case.

Additionally, the Alabama Supreme Court decision is clearly erroneous because the Sharriefs did present substantial evidence, including the testimony of Respondent doctor and her expert, which clearly showed that Gerlach breached the standard of care and that said breach proximately caused the death of Quanetta Buchannon. Appellant briefs and chart at App. H Code of Alabama, 1975, Title 12-21-12 states, in pertinent part: "Substantial evidence shall shall mean evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the fact sought to be proven." The Sharriefs contend that they met and exceeded this standard.

Finally, the Alabama Supreme Court's decision affirming the trial court's Judgment and post-judgment Orders is manifestly unjust because: it elevates the jurors above the law by permitting them to decide cases based upon legally impermissible reasons, to wit: race, religion and sex; it permits jurors to violate the law; and it *sanctions* their violations of the law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the Alabama Supreme Court should be reversed.

Respectfully submitted,

Sherryl Snodgrass Caffey
Attorney for Petitioners
200 West Side Square
Suite 55
Huntsville, Alabama 35801
(256) 551-0333

APPENDIX "A-1"

April 20, 2001

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 (334) 242-4621, of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter.**

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1991732

Charles Sharrief and Millie Sharrief as personal representatives of Quanetta M. Buchannon, deceased,

v.

Rebecca Gerlach, M.D.

Appealed from Jackson Circuit Court (CV-94-327)

HARWOOD, Justice.

Charles Sharrief and Millie Sharrief as administrators of the estate of Quanetta M. Buchannon, deceased, sued Dr. Rebecca Gerlach, Dr. Charles Giddens, and Jackson County Hospital, seeking compensatory and punitive damages on

allegations of a wrongful death, in the defendants' providing medical care to Buchannon.

The trial court entered an "Order of Referral to Mediation." During mediation, the plaintiffs' settled their claims against Dr. Giddens and Jackson County Hospital; the court dismissed those defendants pursuant to a motion and joint stipulation for dismissal. Although he was no longer a party to this case, Dr. Giddens was later a witness at trial.

Trial of the plaintiffs' claims against Dr. Gerlach began on September 27, 1999. When Dr. Gerlach was called by the plaintiffs as their first witness, she ran out of the courtroom. The trial judge offered the plaintiffs the option of continuing the trial in Dr. Gerlach's absence, but they declined to do so. The trial court then declared a mistrial. The plaintiffs then made a motion to tax costs to the defendant, but the trial court denied the motion, on the rationale that the plaintiffs had refused to proceed with the trial in the defendant's absence.

A second trial began on January 24, 2000. On January 27, 2000, the jury returned a verdict for Dr. Gerlach. The trial court entered a judgment based on that verdict. The plaintiffs, without first informing the trial court, subpoenaed the jurors for depositions, based on a suspicion that juror misconduct had occurred during the trial.. When the trial court became aware of the subpoenas, it entered an order quashing them. The plaintiffs then filed a "Motion to Alter, Amend, or Vacate" the order quashing the subpoenas, or in the alternative, a "Motion to Take Depositions of Jurors" and a "Motion for Enlargement of Time." The plaintiffs also filed a "Motion to Vacate the Judgment," a "Motion for a New Trial," a "Motion for Post Judgment Hearing," and a "Renewal of Motion to Take Deposition Testimony of Jurors." In response, Dr. Gerlach filed a "Motion for Protective Order" and a "Motion to Strike Affidavits of Mr. Sharrief and

Jurors." The trial court heard arguments on all the motions at the same time; it denied all of the plaintiffs' motions, and granted all of Dr. Gerlach's motions.

The plaintiffs appealed. They make a number of disparate arguments; we summarize them into four basic arguments: (1) that the trial court erred in denying their motion to vacate the judgment, or, in the alternative, for a new trial, because, they contend, the jury verdict was plainly and palpably wrong; (2) that the trial court committed reversible error by denying the plaintiffs' post-trial motions concerning discovery regarding jury deliberations; (3) that the trial court committed reversible errors during the trial; and (4) that the trial court erred in denying their motion to tax costs to Dr. Gerlach after the first trial had ended.[1]

The record shows that Buchannon, age 19, was brought to the Jackson County Hospital emergency room at 9:05 p.m. on July 2, 1993. She had been suffering from vomiting, nausea, and diarrhea for three days. Dr. Gerlach, an emergency – room physician, obtained Buchannon's medical history and examined her. Buchannon's medical history showed that she had delivered a child by cesarean section on June 27, 1993, at Helen Keller Hospital in Muscle Shoals. The baby had been delivered by Dr. Jenny Gapultoes. (Dr. Gapultoes and Helen Keller Hospital were not involved in this case.) Dr. Gerlach's

---

[1] The Court will not address this fourth issue, because the plaintiffs' brief contains no citations to authority supporting their contentions. Rule 28 (a) (5), Ala. R. App. P., specifically requires an appellant to present the appellate court with citations to authorities supporting the appellant's contentions. When an appellant fails to comply with Rule 28 (a) (5), Ala. R. App., this Court may affirm the ruling the appellant is complaining of. McLemore v. Fleming, 604 So.2d 353 (Ala. 1992).

examination indicated that Buchannon was suffering from endometritis, an infection of the uterus, resulting from the cesarean section performed five days earlier. Dr. Gerlach then telephoned Dr. Giddens, the obstetrician-gynecologist ("Ob/GYN") on call for Jackson County Hospital that night, to discuss the case. Dr. Giddens had also been Buchannon's Ob/GYN up until two weeks before the delivery, but because Dr. Gapultoes had delivered Buchannon's baby, Dr. Giddens was no longer considered her attending physician. Dr. Gerlach informed Dr. Giddens of Buchannon's condition and of her test results, informed him that Buchannon had requested that he be present, and asked him to come in on Buchannon's behalf. Dr. Giddens declined to come to the emergency room. Dr. Gerlach then advised Dr. Giddens that her recommended course of treatment would include a shot of Rocephin,[2] 1 gram, by intramuscular injection, and a prescription of Doxycycline.[3] Dr. Giddens concurred with the recommended course of treatment. Dr. Gerlach further proposed that Buchannon be released and that she follow up with an Ob/GYN within a few days. Dr. Gerlach then asked Dr. Giddens to do a "follow-up" examination with Buchannon in 2-4 days, but he declined that request; recommending instead that Buchannon be instructed to return to the physician who had delivered her baby. Dr. Giddens then approved Dr. Gerlach's recommendations for

---

[2] Rocephin is a sterile, semisynthetic, broad-spectrum cephalosporin antibiotic for intravenous or intramuscular administration. Physicians' Desk Reference 2765 (55th ed. 2001).

[3] Doxycycline is a broad-spectrum tetracycline antibiotic used against a wide variety of bacterial infections. Physicians Desk Reference 2254 (55th ed. 2001)

treatment, and that treatment was administered. Buchannon was released from the hospital at 10:45 p.m. The next morning, Buchannon became unconscious and unresponsive; she was rushed by ambulance to Scottsboro Medical Center. On July 3, 1993 at 7:17 a.m., Buchannon was pronounced dead. The official cause of her death was septic shock due to endometritis due to cesarean section.

I. The Verdict and the Denial of the Plaintiffs' Postjudgment Motions

We first consider whether the trial court erred in denying the plaintiffs' motion for a new trial. The plaintiffs' motion for a new trial. The plaintiffs based that motion on the argument that the jury's verdict was not supported by the evidence.

> " [W] hen the evidence meets the 'sufficiency' test, jury verdicts are presumed correct, and this presumption is strengthened by the trial court's denial of a motion for new trial. Therefore, a judgment based upon a jury verdict and sustained by the denial of a post-judgment motion for a new trial, will not be reversed on a weight-of-the-evidence ground unless it is 'plainly and palpably' wrong. Ashbee v. Brock, 510 So. 2d 214 (Ala. 1987). See, also, Jawad v. Grande, 497 So. 2d 471 (Ala. 1986)."

Alpine Bay Resorts, Inc. v. Wyatt, 539 So. 2d 160, 162-63 (Ala. 1988).

Thus, this Court will reserve the trial court's denial of the plaintiffs' motion for a new trial only if this court concludes that the verdict was plainly and palpably wrong. Generally, in order to prove liability

in a medical-malpractice case, the plaintiff must show (1) the appropriate standard of care for the treatment supplied by the defendant health-care provider, (2) a deviation from that standard of care by the defendant, and (3) a proximate casual connection between the injury alleged by the plaintiff and the defendant's breach of the standard of care. Looney v. Davis, 721 So. 2d 152 (Ala. 1998). The plaintiffs presented the testimony of Dr. William E. Garrett, assistant professor of surgery at Meharry Medical College. Dr. Garrett testified that Dr. Gerlach's examination and treatment of Buchannon was below the standard of care. However, Dr. Sherry Squires, associate medical director of the emergency department at Huntsville Hospital, testifying as an expert on behalf of Dr. Gerlach, stated that Dr. Gerlach's treatment of Buchannon met the standard of care. The resolution of conflicts in the evidence rests solely with the trier of fact, in this case, the jury. Jones v. Beltazar, 658 So. 2d 420 (Ala. 1995); James v. Woolley, 523 So. 2d 110, 112 (Ala. 1988).

The record contains substantial evidence to support the jury verdict; thus, we must conclude that the verdict was not plainly and palpably wrong. Stokes v. Long-Lewis Ford, Inc., 549 So. 2d 51, 52 (Ala. 1989); Merrell v. Joe Bullard Oldsmobile, Inc., 529 So. 2d 943, 946 (Ala. 1988). The trial court did not err in denying the plaintiffs' motion for a new trial.

2. Posttrial Motions Concerning Discovery Regarding Jury Deliberations

We next consider the plaintiffs' argument that the trial court erred in denying their posttrial motions seeking discovery regarding the jury's deliberations. These motions included a motion to subpoena jurors,

a motion to vacate the order quashing the juror subpoenas, a motion to take juror depositions, and a motion for enlargement of time to take juror depositions, and a motion renewing the plaintiffs' motion to take depositions, affidavits, and oral testimony of jurors. Matters concerning discovery pending appeal are within the trial court's discretion. Rule 27 (b), Ala. R. Civ. P. "[R] elief under Rule 27 is discretionary with the trial court, and a trial court's ruling on a Rule 27 petition will not be reversed in the absence of an abuse of discretion." Ex parte Anderson, 644 So. 2d 961, 964 (Ala. 1994). Even if this court viewed these subpoena requests as coming within the ambit of Rule 30, Ala. R. Civ. P., the abuse-of-discretion standard would still apply. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991).

After the trial, the plaintiffs had the trial-court clerk issue subpoenas to the jurors, without having gotten the approval of the trial court. In pertinent part, the trial court's order quashing the subpoenas stated:

> "The plaintiffs' attorney failed to comply with Rule 27 of the Alabama Rules of Civil Procedure for the taking of the depositions of witnesses pending appeal or before the taking of an appeal if the time therefor has not expired. The plaintiffs filed no motion with the court for authorization to take the depositions. Furthermore, the witnesses subpoenaed by the plaintiffs were jurors and the court is mindful of the special rules of law that apply to the testimony of jurors and policy considerations for these rules of law."

All of the plaintiffs' arguments concerning posttrial discovery regarding the jury's deliberations are based on three affidavits that had been taken

before the trial court quashed the subpoenas. The first was the affidavit of Charles Sharrief, Buchannon's father (who is also one of the plaintiffs). Sharrief's affidavit contains a list of statements made to him by some of the jurors after the trial. The trial court found that Mr. Sharrief's affidavit was comprised completely of "hearsay," as that term is defined by Rule 802, Ala. R. Evid. The Court notes that the plaintiffs have not directly challenged, by citation to any authority, the propriety of the trial court's order striking the affidavit of Sharrief on the basis that it contained nothing but hearsay. See Rule 28 (a) (5) Ala. R. App. P. Hearsay evidence is not admissible in support of a motion for a new trial, and a new trial will not be granted on the basis of such evidence. Jefferson County v. Kellum, 630 So.2d 426, 427 (Ala. 1993). We conclude that the trial court did not abuse its discretion by refusing to allow Charles Sharrief's affidavit to support the issuance of subpoenas to individual jurors.

Affidavits were also obtained from two of the jurors, S. and H. Their affidavits case contain accounts of some jurors' discussions during deliberations. Rule 606 (b), Ala. R. Evid., reads:

"(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may

a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Nothing herein precludes a juror from testifying in support of a verdict or indictment."

This Court has stated:

> "Generally, affidavits are inadmissible to impeach a jury's verdict. An affidavit showing that impeach a jury's verdict. An affidavit showing that extraneous facts influenced the jury's deliberations is admissible; however, affidavits concerning 'the debates and discussions of the case by the jury while deliberating thereon' do not fall with this exception."

HealthTrust, Inc. v. Cantrell, 689 So. 2d 822, 828 (Ala. 1997). See also Ala. R. Evid. 606 (b); this rule is substantially similar to Rule 606 (b), Fed. R. Evid. In Peveto v. Sears, Roebuck & Co., 807 F.2d 486, 489 (5th Cir. 1987), the United States Court of Appeals for the Fifth Circuit held that "by implementing Rule 606 (b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation." The Seventh Circuit has held that Rule 606 (b) is designed "to protect the judicial process from efforts to undermine verdicts by scrutinizing the jurors' thoughts and deliberations." United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988). Other courts of appeals for the federal circuits have stated that Rule 606 (b) promotes "free and uninhibited discourse during deliberations." Attridge v. Cencorp Div. Of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987); Maldonado v. Missouri Pac. Ry., 798 F.2d 764 (5th Cir. 1986).

The Plaintiffs misconceive the distinction, under Alabama law, between "extraneous facts," the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the "debates and discussions of the jury," which are protected from inquiry. This Court's cases provide examples of extraneous facts. This Court has determined that it is impermissible for jurors to define terms, particularly legal terms, by using a dictionary or encyclopedia. See Fulton v. Callahan, 621 So. 2d 1235 (Ala. 1993); Pearson v. Fomby, 688 So. 2d 239 (Ala. 1997). Another example of juror misconduct leading to the introduction of extraneous facts sufficient to impeach a jury verdict is an unauthorized visit by jurors to the scene of an automobile accident, Whitten v. Allstate Ins. Co., 447 So. 2d 655 (Ala. 1984), or to the scene of a crime, Dawson v. State, 710 So. 2d 472 (Ala. 1997).

The problem characteristic in each of these cases is the extraneous nature of the fact introduced to or considered by the jury. The improper matter someone argues the jury considered must have been obtained by the jury or introduced to it by some process outside the scope of the trial. Otherwise, matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision. CSX Transp. V. Dansby, 659 So. 2d 35 (Ala. 1995). This Court has also noted that the debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts that would provide an exception to the general rule of exclusion of juror affidavits to impeach the verdict. Weekly v. Horn, 263 Ala. 364, 82 So. 2d 341 (1955).

Nothing contained in the affidavits indicates the jury considered any extraneous facts. All the statements in the affidavits relate to evidence that was

presented at trial or to information that was otherwise brought to the attention of the jury during the trial. The affidavits provide no evidence that the jury consulted any outside sources of information regarding the definition of "standard of care," or regarding any other matter. Nothing in either of the affidavits indicates that the jury, or any particular juror was influenced by any outside source. The trial court did not abuse its discretion in denying the plaintiffs' posttrial motions seeking discovery regarding the jury's deliberations. Healthtrust, Inc. v. Cantrell, 689 So. 2d 822 (Ala. 1997)

III. Alleged Errors During Trial

The plaintiffs argue that the trial court erred in overruling their objection pursuant to Batson v. Kentucky, 476 U.S. 79, (1986), to the defendant's striking all but three of the women on the venire. The plaintiffs' also argue that they made an objection to the composition of the jury and a Batson objection to the striking of the one black member of the venire, but we have found no such objections in the record.

We first address the plaintiffs' claim that Dr. Gerlach violated the principles of Batson by using 7 of her 10 peremptory strikes against women. Because the plaintiffs did not object to the striking of the sole black juror, no other Batson argument has been preserved for our review. Cone Bldrs., Inc. v. Kulesus, 585 So. 2d 1284 (Ala. 1991); Bruner v. Cawthon, 681 So. 2d 161 (Ala. Civ. App. 1995). A trial court's ruling on a Batson objection is entitled to great deference, and we will not reverse a judgment because of such a ruling unless it is clearly erroneous. Ex parte Branch, 526 So. 2d 609 (Ala. 1987). In Batson, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a prosecutor in a

criminal case from exercising peremptory strikes to remove black potential jurors from a black defendant's jury solely on the basis of their race. In Edmonson v. Leesville Concrete Co., 500 U.S. 614, (1991), the United States Supreme Court extended the Batson principles to civil cases. "The burden of persuasion is initially on the party alleging a discriminatory use of peremptory challenges to establish a prima facie case of discrimination." Thomas v. Diversified Contractors, Inc., 578 So. 2d 1254, 1255 (Ala. 1991). In J.E.B. v. Alabama, 511 U.S. 127, (1994), the United States Supreme Court further extended Batson to gender – based strikes. "Only after a prima facie showing of discrimination has been established is a trial court under a duty to require an opposing party to provide [gender -] neutral reasons for his peremptory strikes. Thomas at 1255.

The following exchange took place at trial:

MS. CAFFEY: "Your Honor, according to my calculations of the thirty-six potential jurors, Plaintiffs are left with either two or three women; and we would submit for the Court's consideration that three female jurors – that the striking of the women was done in a sexually biased manner in order to exclude mothers from the jury, and they struck some women but was based upon responses that were given during the jury voir dire [sic]; and we showed that they might be biased in the case, such as, the inability to award a large sum of money, and two or three of them indicated – well, one indicated that she would not be able to follow the Court's jury instructions and other indications like that. And, also, the Plaintiffs struck two jurors who indicated a knowledge and relationship with Dr. Gerlach as a result of

their employment with the Jackson County Hospital, and considering that there would be some information involving the Jackson County Hospital and the fact that they were a Defendant in this case, those jurors were struck because of their potential bias. And that would be jurors V. and M. Juror W. indicated – well, we didn't strike M., that would be V., but Juror W. indicated that – I believe she indicated that she did not believe that she could be unbiased in this case, and we contend that the three jurors – well, first of all, that women are a representative group in the Jackson County community and that three female jurors out of a potential thirty-six would certainly constitute less than the percentage of women in the community, and also, it's less than a reasonable percentage of jurors that are left on the jury; and that's one-third of the jury.

MR. KEY [defense attorney]: "Is that a prima facie case, Your Honor?

THE COURT: "Are you saying it is?

MR. KEY: "I'm saying it is not."

THE COURT: "Well what are your grounds in that regard?

MR. KEY: "Judge, we can give a reason for every strike that we made, but the point is that we had ten strikes, and how many women are left on the jury?

THE COURT: "Three.

MR. KEY: "Well, I'll say this. It's very unusual because it seems like that the last forty cases that I've tried, it's been about eight to three females; but, you know, there's no – I just don't see that there's any prima facie case here based on – you do have three women on the jury; and unless we're called to show gender-neutral reasons, then that's as far as I can go because I just don't see it.

MS. CAFFEY: "Well, you struck seven of the females jurors, none of whom gave any indication of being connected with any of the parties.

MR. KEY: "Well, for instance, the last strike, she indicated that she had been treated for diarrhea and vomiting and throwing up and had been put on IV's within four hours; and that's what they're saying that we should've done, and we've got reasons. And if we're forced to go back and reconstruct them, then we can, but –

THE COURT: "Well, the Court rules that the Plaintiff [sic] has not made a prima facie case of discrimination in regard to gender. All right; anything further?

MS. CAFFEY: "Your honor, my understanding of the law is that I would have to show that the group would be a representative group in the community and that the defendants abused strikes in a manner... which left the number of jurors on the jury in this representative group less than the percentage of that group in the community; and I've clearly shown that. I have also offered the Court an explanation insofar as the striking of female jurors by the Plaintiffs and have shown sex-neutral reasons; and the

> Defendant has indicated that they would have to put together some reasons for the striking, and –

THE COURT: "Well, that was not my understanding of the statement made by defense counsel. All right; that's my ruling. Do you have anything further?

MS. CAFFEY: "No, Your Honor."

The plaintiffs' only objection regarding the defendant's strikes of women, if it can be characterized as an objection, was to the fact that only three women were left on the jury. However, "[I]t is important that the defendant come forward with facts, not just numbers alone, when asking the [trial] court to find a prima facie case" of ... discrimination." McElemore v. State, [CR-98-2212, March 31, 2000] ___ So. 2d ___, ____ (Ala. Crim. App. 2000) (quoting Mitchell v. State, 579 So. 2d 45, 48 (Ala. Crim. App. 1991), in turn quoting United States v. Moore, 895 F. 2d 484, 485 (8th Cir. 1990). Based on the record, we conclude that the plaintiffs did not present a prima facie case of improper strikes on the basis of gender. In Ex parte Trawick, 698 So, 2d 162 (Ala. 1997), this Court reasoned:

> "Trawick has offered no evidence that the female veniremembers shared only the characteristics of gender, that anything in the type or manner of the prosecutor's statements or questions during the extensive voir dire indicated an intent to discriminate against female jurors, that there was a lack of meaningful voir dire directed at the female jurors, or that female jurors and male jurors were treated differently. He has offered no evidence that the prosecutor had a history of

> using peremptory challenges in a manner that discriminated against veniremembers of either gender. Instead ,Trawick has merely emphasized that the State used many of its strikes to remove women from the venire. Without more, we do not find that the number of strikes this prosecutor used to remove women from the venire is sufficient to establish a prima facie case of gender discrimination."

698 So. 2d at 168. The reasoning of Trawick applies here. We have reviewed the trial transcript, and our review indicates the plaintiffs presented nothing to show a prima facie case of gender discrimination. Therefore, the trial court was not required to have the defense provide gender-neutral reasons for its peremptory strikes. We conclude that the trial court acted within its discretion in denying the plaintiffs' Batson motion.

The plaintiffs also argue that the trial court erred in excluding their Exhibit 5 (Defendant's Medical Record" annotated by Dr. William Garrett during trial) and their Exhibit 7 (pamphlets on Rocephin and Doxycycline). However, the plaintiffs made no objections at trial to the exclusion of these exhibits, and this Court will not consider objections to the exclusion of evidence that were not raised at trial. Zielke v. AmSouth Bank, N.A. 703 So. 2d 354, 361 (Ala. Civ. App. 1996); Bolen v. Hoven, 143 Ala. 652, 39 So. 379 (1905). We note further that the plaintiffs' brief contains no citations to authority supporting their contentions. See Rule 28 (a) (5), Ala. R. App. P.; McLemore v. Fleming, 604 So.2d 353 (Ala. 1992).

The judgment of the trial court is affirmed.
AFFIRMED.
Moore, C.J., and See, Brown, and Stuart, JJ., concur.

APPENDIX "B-1"

STATE OF ALABAMA) IN THE CIRCUIT COURT
)
JACKSON COUNTY) CASE NO: CV-94-327

CHARLES SHARRIEF, et al.,.....PLAINTIFFS

VS.

REBECCA GERLACH, M.D.....Defendant

ORDER

This case was set for hearing on the plaintiffs' motion to vacate the judgment or, in the alternative, motion for new trial, the plaintiffs' motion to take the deposition testimony of jurors, the defendant's motion for protective order and the defendant's motion to strike the affidavits of Jane Stump, James Headrick, and Charles Sharrief.

The court heard arguments of counsel and received written briefs from the parties.

A verdict was rendered in this case by a duly empaneled Jackson County jury on January 27, 2000, in favor of defendant, Rebecca Gerlach, M.D.

The plaintiffs argued that the judgment is due to be vacated or a new trial ordered because the jury was influenced by extraneous facts during its deliberation. In support of their claim, the plaintiffs submitted the affidavits of two jurors, Jane Stump and James Headrick, and the plaintiff, Charles Sharrief.

The plaintiffs have offered no competent evidence that any "extraneous facts" were injected into the jury's deliberations. The affidavit of the plaintiff, Charles Sharrief, is hearsay and due

to be stricken. Likewise, the affidavits of the jurors are inadmissible to impeach the jury verdict because the matters set forth in the affidavits only concern the debates, discussions and statements of the jurors while deliberating their decision. CSX Transportation, Inc. v. Dansby, 659 So. 2d 35 (Ala. 1995). The affidavits of jurors are not admissible to impeach their verdicts, unless the affidavits tend to show extraneous facts that influenced the verdict. The debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts which would provide an exception to the general rule of exclusion of juror affidavits to impeach the verdict. Weekly v. Horn, 82 So. 2d 341 (1955).

The court finds that the defendant's motions to strike the affidavits of jurors, Jane Stump and James Headrick, are due to be granted.

The plaintiffs filed a motion to take the deposition testimony of jurors to which the defendant responded with a motion for protective order. The court finds that the plaintiffs' motion is due to be denied. The plaintiffs had available to them the opportunity to offer affidavit or live juror testimony at the hearing.

The plaintiffs cite additional grounds in their written motion to vacate the judgment or grant a new trial. The court has considered each one.

Upon consideration thereof, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion to vacate the judgment or, in the alternative, for a new trial is denied.

Done this 1st day of May, 2000.

"s/Jenifer C.Holt
Circuit Judge

APPENDIX "C"

STATE OF ALABAMA) IN THE CIRCUIT COURT
)
JACKSON COUNTY) CASE NO. CV-94-327

CHARLES SHARRIEF, et al.,.....PLAINTIFFS

VS.

REBECCA GERLACH, M.D.....Defendant

ORDER

The plaintiffs' Motion to Alter, Amend or Vacate the Judgment, Motion to Take Depositions of Jurors, Motion for Enlargement of Time, Motion to Vacate the Judgment, Motion for New Trial, and Motion for Post-Judgment Hearing Renewal of Motion to Take Deposition Testimony of Jurors, and the defendant's Motion for Protective Order are scheduled for hearing at 1:15 P.M. on the 5th day of April, 2000.

Done this the 1st day of March, 2000.

"s/Jenifer C. Holt, CIRCUIT JUDGE

APPENDIX "D-1"

STATE OF ALABAMA) IN THE CIRCUIT COURT
)
JACKSON COUNTY) CASE NO. CV-94-327

CHARLES SHARRIEF, et al.,.....PLAINTIFFS

VS.

REBECCA GERLACH, M.D.....Defendant

ORDER

A verdict was rendered in this case by a duly empaneled Jackson County jury on January 27, 2000, in favor of the defendant, Rebecca Gerlach, M.D.

On February 23, 2000, the plaintiffs, by and through their attorney, Sherryl Snodgrass Caffey, filed subpoenas with the Clerk of the Court, wherein it was stated that each and every juror was ordered to appear before the court, unless otherwise excused, for deposition at the request of the plaintiff with the depositions to take place at the law offices of al local attorney on February 25, 2000. The subpoenas further provided that failure to obey this subpoena may be deemed a contempt of court from which the subpoena was issued.

The plaintiff's attorney failed to comply with Rule 27 of the Alabama Rules of Civil Procedure for the taking of the depositions of witnesses pending appeal or before the taking of an appeal if the time therefor has not expired. The plaintiffs filed no motion with the court for authorization to take the depositions. Furthermore, the witnesses subpoenaed by the plaintiffs were jurors in the case and the court

by the plaintiffs were jurors in the case and the court is mindful of the special rules of law that apply to the testimony of jurors and the policy considerations for these rules of law.

ACCORDINGLY, the court, on its own motion, hereby quashes the subpoenas issued to the jurors in this case on February 23, 2000.

Done this 25th day of February, 2000.

"s/JENIFER C. HOLT
Circuit Judge

APPENDIX "E-1"

IN THE CIRCUIT COURT OF JACKSON COUNTY, ALABAMA

CHARLES SHARRIEF and MILLIE SHARRIEF, Personal Representatives of QUANETTA M. BUCHANNON, deceased,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO., CV-94-327**
REBECCA GERLACH, M.D.,	)	
Defendant.	)	

MOTION TO ALTER, AMEND OR VACATE THE JUDGMENT
or in the alternative,
MOTION TO TAKE DEPOSITIONS OF JURORS
and
MOTION FOR ENLARGEMENT OF TIME

COMES NOW Plaintiffs, by and through their undersigned counsel of record, and hereby move this Honorable Court to vacate its ruling (communicated telephonically by the trial judge on February 24, 2000 to the undersigned counsel) canceling Plaintiff's depositions of the jurors in the above-styled matter and recalling the subpoenas therefor; *or in the alternative*, to permit them to take the depositions of the jurors in their case, and to use said depositions in support of their Rule 59 Motions, and to enlarge the

time period for filing evidence in support of Rule 59 Motions; and as grounds therefor states the following:

1. During the aforesaid telephonic communication, this Honorable Court cited Plaintiffs' failure to comply with ARCP Rule 27(b) and complaints from the jurors as grounds for its aforesaid ruling. However said Rule requires the approval of the Court for the "taking of the depositions of witnesses to **perpetuate** their testimony or ... [for] **discovery under Rule 34 or 35**" [emphasis added], when in fact, Plaintiffs' intended to use juror depositions to support their ARCP 59(a) and (e) Motions in a pending matter, and **not** to perpetuate testimony [for some future action naming the jurors as adverse parties, the reasons for perpetuating testimony as stated in Rule 27(a) and as applied in Rule 27(b) in **Exparte Anderson, 644 So. 2d 961 (Ala. 1994)**], nor for the reasons authorized in Rule 34 (Production of documents and things and entry upon land for inspection and other purposes) or in Rule 35 (Physical and mental examinations of persons). Accordingly, Plaintiffs assert that the depositions of the jurors for their intended purpose is governed by ARCP Rule 30.

2. During the aforesaid telephonic discussion this Honorable Court told the undersigned counsel that she could present Affidavits

3. In support of Plaintiffs' *alternative* Motion to take Depositions and pursuant to the statutory requirements of ARCP Rule 27(b) the following information is provided:

(1) The names and addresses of the jurors are listed at Exhibit A, attached.

The substance of the testimony Plaintiffs expect to elicit from each juror consisted of deliberations on extraneous facts, to include: race of Plaintiffs and their attorney (black); religion of Plaintiffs (Muslim); morality and reputation of Plaintiffs' deceased

daughter, who is the subject of the litigation; juror notes; jurors' definition of the standard of care; the fact that Plaintiffs had not paid for a verdict in their favor; the improper exclusion of expert witness testimony; discussions regarding Giddens violating the standard of care and the Hippocratic Oath, and a vote to indict Giddens; the in-chamber conference regarding the question concerning the Hippocratic Oath and Plaintiffs counsel and others making a big deal out of said question; and other extraneous matters.

(2) The reasons for taking depositions of the jurors are as follows: Plaintiffs need to take depositions of the jurors to support their Rule 59 Motions in accordance with the legal mandates cited by the Alabama Supreme Court in **Jefferson County v. Kellum, 630 So. 2d 426 a (Ala. 1993), citing Whitten v. Allstate Ins. Co., 447 So. 2d 655 (Ala. 1984)**, which ruled:

> **Juror misconduct will justify a new trial when an affidavit, oral testimony, or a deposition indicates that the misconduct resulted in bias or corruption or that the misconduct affected the verdict, or when, from extraneous facts presented by affidavit, testimony , or deposition, prejudice may be presumed as a matter of law.**

As ruled by the Alabama Supreme Court in the afore-cited case and quote therefrom, deposition is one of the three lawful means of presenting to the trial court and preserving for appellate review evidence of: juror

misconduct, or that extraneous facts were considered by the jury, and to show to the trial court and the appellate court that said acts influenced the jury or affected the verdict for appellate review. In the instant case, for the reasons stated herein, deposition of the jurors is the only means of presenting to the trial court and preserving for appellate review the asserted jury deliberations on extraneous facts and/or juror misconduct.

Plaintiffs further assert that this Honorable Court's failure to grant them the right to take the depositions of the jurors, and to use the same in support of their Rule 59 Motions, would severely prejudice them in their ability to meet the pleading and evidence standards set forth in Alabama statue and case law, to include ARCP Rule 56(e) and the afore-cited cases, and would constitute an abuse of discretion and would be manifestly unjust and palpably wrong.

4. Plaintiffs learned of the existence of the aforesaid extraneous communications on February 17, 2000 from one of the jurors, who subsequently agreed to discuss the same with their attorney and to provide an Affidavit. Said juror attempted to contact the undersigned counsel on February 21, 2000 at her office late at night, and again on the morning of February 22, 2000. Based upon information and belief, he left town that day for employment elsewhere before she was able to obtain an Affidavit from him regarding said extraneous and prejudicial communications. Plaintiffs then filed Deposition Notices and Subpoenas to the jury on February 23, 2000, which were canceled and recalled by this Honorable Court on

on February 24, 2000.

Wherefore the premises considered, Plaintiffs respectfully pray this Honorable Court to vacate its ruling that they cannot take the depositions of jurors and to permit them to take the depositions of the jurors within a reasonable time after the Court's ruling on the same.

Plaintiffs further pray this Honorable Court to enlarge the period of time mandated by Rule ARCP 59(c) to permit the filing of requested depositions, and/or other legal evidence to be used in support of their Rule 59 Motions.

Respectfully submitted,

"s/Sherryl Snodgrass Caffey
Attorney for Plaintiffs
200 West Side Square
Suite 5
Huntsville, Alabama 35801

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Counsel for the Defendant by faxing and mailing a copy of the same on this the _____ day of February, 2000.

"s/Sherryl Snodgrass Caffey
Attorney At Law

APPENDIX "F-1"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

CHARLES SHARRIEF and	)	
MILLIE SHARRIEF,	)	
Personal Representatives of	)	
QUANETTA M. BUCHANNON,	)	
deceased,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL**
	)	**ACTION NO.**
	)	**CV-94-327**
	)	
REBECCA GERLACH, M.D.,	)	
	)	
Defendant.	)	

MOTION TO VACATE THE JUDGMENT
or in the alternative,
MOTION FOR NEW TRIAL
and
MOTION FOR POST-JUDGMENT HEARING

COMES NOW your Plaintiffs, by and through their undersigned counsel of record, and hereby move this Honorable Court pursuant to the statutory authority set forth in ARCP Rule 59(e) to: vacate the jury verdict in the above styled matter and rule as a matter of law that the Plaintiffs presented substantial evidence that the Defendant breached the standard of care required of ER physicians in the community; grant a verdict in their favor; and set this matter for a jury hearing on damages. Should this Court deny the

aforesaid ARCP Rule 59(e) Motion, ***as an alternative***, Plaintiffs move this Honorable Court pursuant to the to the statutory authority set forth in ARCP Rule 59(a) to grant them a New Trial. Pursuant to the statutory authority set forth in ARCP Rule 59(g), Plaintiffs further move this Honorable Court to set a hearing on their aforesaid motions and to permit them to present oral testimony at said hearing. Plaintiffs further hereby renew their Motion to Take the Deposition of Jurors which was previously filed with this Honorable Court.

Motion to Vacate the Judgment and Motion for New Trial

As grounds for their Motion to Vacate the Judgment and Motion for New Trial, your Plaintiffs offer the trial record, the trial Exhibits, the notes taken by this Honorable Court, and further state as follows:

1. **The verdict is contrary to the great weight or preponderance of the evidence.**

During the trial of this matter Plaintiffs presented overwhelming testimony and evidence which clearly showed that the Defendant breached the standard of care. Plaintiffs' expert and Defendant's expert, and even the Defendant, agreed that the standard of care for persons with the diagnosis of Plaintiffs' daughter, to wit: endometritis, at the time of Quanetta's death, was and continues to be: "hospitalization and intravenous therapy with broad-spectrum antibiotics with anaerobic coverage, and the following:

APPENDIX "F-3"

1. Take and consider presentment history
2. Make appropriate examinations
3. Order appropriate tests
4. Re-test abnormal findings and then re-assess the patient
5. Quantify findings
6. Consult with another physician when appropriate and give consulting physician presentment history, results of any examination and tests, to include positives and negatives and abnormal findings
7. Admit patient when appropriate
8. Evaluate, stabilize, and treat patient

The expert testimony, and indeed the testimony of the Defendant, clearly showed that she failed to meet any of the foregoing, to wit:

1. Defendant did not consider that the presentment history which included: fluctuating vital signs, an indication of severe dehydration reading at the most serious level possible, bizarre white blood count and shift, boggy uterus (indicating pus-filled), no bowel sounds (indicating serious infection), and tenderness through the pelvic area (indication infection which had spread beyond the lining of the uterus, thus, peritonitis or sepsis, versus endometritis).
2. Defendant did not conduct a pelvic exam by speculum, exam for fecal leucocytes, appropriate x-rays of the abdominal and pelvic area.
3. Defendant did not order additional CBC tests, electrolytes test.
4. Defendant did not retest even though all of her test results ranged from unusual to bizarre readings.

of her test results ranged from unusual to bizarre readings.

5. Defendant did not quantify findings in terms of the amount of vomiting, the amount of diarrhea, the color and odor of the lochia.

6. She did not consult with another physician. She merely asked Dr. Giddens to follow-up 2-4 days after the ER visit. Moreover, she did not tell him about the fluctuating vitals, no bowel sounds, the dehydration reading, (specific gravity 1.030, the highest reading possible), the bizarre CBC results (left shift with 77 bands), the boggy uterus, the tenderness throughout the pelvic area, etc. In fact, [Gerlach] told him that Quanetta had a "little endometritis" with normal vitals and normal temperature – all of which were grossly misstated, deceptive, and misleading when considering Quanetta's true medical condition at the time Defendant had this conversation, which Defendant knew about through the information she did not give him. Defendant did not give him the negatives nor the abnormal findings. She only gave him the positives. See Plaintiffs' Exhibits 1, 2, 3, and 9

7. Defendant did not attempt to have Quanetta admitted. Moreover, she did not give her IV antibiotics and hydration in the ER.

8. Defendant failed to properly evaluate, stabilize and treat Quanetta, and this failure proximately caused Quanetta's death.

9. The verdict is contrary to the law.

Plaintiffs hereby contend that based upon the facts of this case; the Court's Record; Plaintiffs' trial testimony and Exhibits, and the lack of any credible rebuttal evidence thereto; juror misconduct and their use of prejudicial extraneous facts (which influenced jurors to be more in favor of the Defendant than the Plaintiff and resulted in a verdict in favor of the Defendant, or which as a matter of law are presumed to be prejudicial) the jury verdict is contrary to Alabama statutory and case law. Please see Plaintiffs' Brief in Support of their Rule 59 Motions.

10. The verdict is plainly and palpably wrong.

Based upon all of the reasons stated herein, and the Court's Record regarding this case, the verdict in favor of the Defendant is plainly and palpably wrong.

11. The trial court abused its discretion and/or erred to reversal with the following rulings.

A. Overruling Plaintiffs' Batson Objection to the jury venire; to the striking of the only Black juror; and to the striking of all but three of the women.

The overruling of Plaintiffs' Batson objection to the jury venire forced Plaintiffs (Black), who were represented by a Black attorney, to have their case against a white doctor tried by an all white jury, which promoted an opportunity for jurors to engage in impermissible discussions regarding race and race-related matters or racial misconceptions and stereotypes, and to consider the same in rendering their verdict. One juror told on of the Plaintiffs that

they made a mistake by coming into the Courtroom with a Black attorney; that they should have at least had an old bald-headed white man to speak to the jury.

B. Sustaining the Objection of Defendant to the Admission of Plaintiffs' Exhibit 5 (Defendant's Medical Record annotated by Plaintiffs' Expert (Dr. Garrett) during the trial.

During the trial, Plaintiffs presented testimony from their expert using a blow-up of the Defendant's medical record so that the Jury could follow his testimony. During said testimony, and in response to questions from Plaintiffs' counsel, said expert annotated with a yellow high-lighter those portions of Defendant's medical record containing crucial information for making a correct diagnosis and rendering the appropriate medical treatment; and with another color high-lighter to show the limited information which the Defendant gave to Dr. Giddens. Said document was properly identified by the Defendant, and contained crucial testimony, given the facts of this case, as evident in the fact that the Jury blamed Dr. Giddens for Quanetta's death, and even voted to indict him because they attributed to him knowledge regarding Quanetta's medical condition which the Defendant never told him. The Court's adverse ruling denying admission of this Exhibit severely prejudiced Plaintiffs, and contributed to, or caused the verdict against them.

C. Sustaining the Objection of Defendant to the Admission of Plaintiff's Exhibit 7 (Pamphlets on Rocephin and Doxycycline showing peak times of said medications and coverage.

APPENDIX "F-7"

Both Plaintiffs' expert and Defendant's expert, and the Defendant testified that the Treatise excerpt marked during trial as Plaintiffs' Exhibit 6 was used by them in their practice and/or to teach; and that it was recognized in the national community as constituting the "standard of care for ER physicians." Said Treatise, excerpt, **Exhibit D**, stated that: "Hospitalization and intravenous therapy with broad-spectrum antibiotics with anaerobic coverage is recommended" for treatment of endometritis, Defendant Doctor's diagnosis. Plaintiffs presented further testimony from their expert that the Rocephin shot and prescription for Doxycycline did not meet the foregoing standard of care because they were not administered in sufficient dosage, nor intravenously, and the **peaked within a few hours** and offered Plaintiffs' Exhibit 7, PDR definitions of the aforesaid medications, which showed the specific peak times of the aforesaid medications and their coverage. Said Exhibit was properly identified by both experts, however, this Court sustained the objection to the admission of this Exhibit. Contrary to the information in the aforesaid Exhibit 7, the jurors determined during their discussions that the aforesaid medications were long-lasting; and said erroneous determination prejudiced your Plaintiffs. The Court's adverse ruling denying admission of this Exhibit severely prejudiced Plaintiffs, and contributed to, or caused the verdict against them.

D. Overruling Plaintiffs' Objection to Defendant being permitted to change his election of whether the Jury would be told about the prior Settlements with Dr. Giddens and Jackson County Hospital from the time of the first trial; and again after the second trial had commenced.

APPENDIX "F-8"

12. <u>Newly discovered evidence shows that the jury considered prejudicial extraneous facts during its deliberations.</u>

Subsequent to the trial and during conversations with some of the jurors, Plaintiffs learned that the jurors had discussed and considered prejudicial extraneous facts during its deliberations, to wit: race of Plaintiffs; race of Plaintiff's attorney (black); religion of Plaintiffs (Muslim); morality and reputation of Plaintiffs' deceased daughter, who is the subject of the litigation; Plaintiffs' counsel's jewelry and "spiked shoes;" the failure of Plaintiffs' expert to correct Plaintiffs' counsel when she mistakenly called him Dr. Gerlach as disqualification for him being an expert; juror notes; jurors' definition of the standard of care; the fact that Plaintiffs had not paid for a verdict in their favor; the improper exclusion of expert witness testimony; discussions regarding Giddens violating the standard of care and the Hippocratic Oath, and a vote to indict Giddens; that Plaintiffs could sue Giddens and recover damages from him; the in-chamber conference regarding the question concerning the Hippocratic Oath and Plaintiffs counsel; and others making a big deal out of said question; and other extraneous matters.

In further support of the foregoing, Plaintiffs submit the following to this Honorable Court:

1. The Jurors improperly and unlawfully considered the religion (Muslim) and race of Plaintiffs. **Exhibits A, B, and C.**
2. The Jurors developed their own definition of the "standard of care" and used the same, thereby violating this Court's Jury Instruction regarding the legal definition of the "standard of care" applicable to the

facts of this case, and Alabama statutory and case law. **Exhibits A, B, and C.**

3. The Jurors improperly and unlawfully considered the morality, lifestyle, and reputation of the Plaintiff's daughter, who is the subject of this litigation. **Exhibits A, B, and C.**
4. The Jurors improperly and unlawfully considered the notes taken by other jurors in direct violation of this Court's Jury Instruction. **Exhibits A, B, and C.**
5. The Jurors improperly and unlawfully discussed and decided that Dr. Giddens, a non-party to this action violated the standard of care, and voted to indict him; and in the process deferred their obligations with respect to the defendant doctor, Gerlach. Further, the Jurors improperly and unlawfully discussed the "Hippocratic Oath" as a part of their version of the "standard of care" even though they sent out a jury question requesting the definition of the same. **Exhibits A, B, and C.**
6. The Jurors improperly and unlawfully deliberated at times in small groups versus as a whole in direct violation of this Honorable Court's jury instruction that they were to at all times deliberate as a whole. **Exhibits A, B, and C.**

Motion for Post-Judgment Hearing

Pursuant to the statutory authority set forth in ARCP Rule 59(g), Plaintiffs hereby move this Honorable Court for a hearing on their Rule 59(e) and Rule 59(a) Motions, and to permit them to present oral testimony at the same. Further, pursuant to the

statutory authority set forth in ARCP Rule 6(b), Plaintiffs move this Court to enlarge the time for their submission and service of Affidavits in support of their Rule 59(c) Motion until minimally 15 days from the entry date of this Court's ruling hereon. As grounds for said hearing, Plaintiffs state as follows:

1. Plaintiffs need to take oral testimony and /or affidavit testimony from the jurors and witnesses to support their Rule 59 Motion in compliance with the legal mandates cited by the Alabama Supreme Court in **Jefferson County v. Kellum, 630 So. 2d 426 (Ala. 1993), citing Whitten v. Allstate Ins. Co., 447 So. 2d 655 (Ala. 1984)**, to wit:

> **Juror misconduct will justify a new trial when an affidavit, oral testimony, or a deposition indicates that the misconduct resulted in bias or corruption or that the misconduct affected the verdict, or when, from extraneous facts presented by affidavit, testimony , or deposition, prejudice may be presumed as a matter of law.**

2. As ruled by the Alabama Supreme Court in the afore-cited case and quote therefrom, oral testimony is one of the three lawful means of presenting to the trial court and preserving for appellate review evidence of: juror misconduct, or that extraneous facts were considered by the jury, and to show to the trial court and the appellate court that said acts influenced the jury or affected the verdict for appellate review. In the instant case, should this Court deny Plaintiffs' Motion to Vacate its Judgment denying them the opportunity to take depositions of the Jurors, Plaintiffs are then left with oral testimony and affidavit testimony as being their only means of

presenting evidence of juror misconduct as alleged herein to this Court, and to the Appellate Courts. Moreover, inasmuch as several jurors have declined to even talk to the undersigned counsel, and others are not available, Plaintiffs require all three options in order to not be severely prejudiced in the presentation of evidence in support of their Post-Judgment Motions.

3. Plaintiffs learned of the existence of the aforesaid extraneous communications on Friday, 17, 2000 from one of the jurors, who subsequently agreed to discuss the same with their attorney and to provide an Affidavit. Said juror attempted to contact the undersigned counsel on February 21, 2000 at her office late at night, and again on the morning of February 22, 2000. The undersigned counsel was at home when said juror phoned on the 21st and said juror hung up before she answered the phone on February 22, 2000. Based upon information and belief, he left town that day for employment elsewhere before she was able to reach him and to obtain an Affidavit from him regarding said extraneous and prejudicial communications. Plaintiffs then filed Deposition Notices and Subpoenas to the jury on February 23, 2000, which were canceled and recalled by this Honorable Court on February 24, 2000.

4. Given the foregoing circumstances, Plaintiffs have had insufficient time to contact jurors who have been unavailable for her phone calls. Additionally, several jurors have declined to even talk to the undersigned counsel.

5. Further, during the telephonic discussion this Honorable Court had with the undersigned counsel to provide notice that she had canceled Plaintiffs' depositions of jurors, and recalled subpoenas therefor, this Court told the undersigned counsel that she could present the Affidavits or oral testimony at the hearing on any post-judgment

motions.

6. Plaintiffs further assert that this Honorable Court's failure to grant them the opportunity to present deposition testimony, oral testimony and affidavit testimony and to grant their request for an enlargement of time to submit the same, to include the Affidavits of jurors and witnesses, and to use the same in support of their Rule 58 Motions, would severely prejudice them in their ability to meet the pleading and evidence standards set forth in Alabama statute and case law, to include ARCP Rule 56(a) and the afore-cited cases, and under the circumstances of this case, which includes this Court's cancellation of the jurors' depositions, would constitute an abuse of discretion and would be manifestly unjust and palpably wrong.

Plaintiffs hereby renew their Motion to Take the Deposition of Jurors.

WHEREFORE THE PREMISES CONSIDERED, Plaintiffs respectfully pray this Honorable Court to vacate the jury verdict for the Defendant, and to rule for them as a matter of law, and to set this matter for a jury trial to assess damages, ***or in the alternative,*** Plaintiffs pray this Honorable Court to grant a New Trial.

Plaintiffs additionally pray this Honorable Court pursuant to the statutory authority set forth in ARCP Rule 59(g) to grant them a hearing in this matter and to permit them to present deposition testimony, oral testimony and affidavit testimony in support of their motion.

APPENDIX "F-13"

IDENTIFICATION OF PLAINTIFFS' EXHIBIT A-D

Exhibit A: **Affidavit of Juror Jane Stump**

Exhibit B: **Affidavit of Juror James Headrick**

Exhibit C: **Affidavit of Charles Sharrief**

Exhibit D: **Treatise Excerpt**

Respectfully submitted,

"s/Sherryl Snodgrass Caffey
Attorney for Plaintiffs
200 West Side Square
Suite 55
Huntsville, Alabama 35801
(256) 551-0333

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Counsel for the Appellee by mailing a copy of the same on this the _____ day of February, 2000.

"s/Sherryl Snodgrass Caffey
Attorney At Law

APPENDIX "F-14"

IN THE CIRCUIT COURT OF JACKSON COUNTY, ALABAMA

CHARLES SHARRIEF and MILLIE SHARRIEF, Personal Representatives of QUANETTA M. BUCHANNON, deceased,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. CV-94-327**
REBECCA GERLACH, M.D.,	)	
Defendant.	)	

AFFIDAVIT OF JANE STUMP

STATE OF ALABAMA }
}
JACKSON COUNTY }

I, Jane Stump, have personal knowledge of the following; and I hereby affirm that the same is true and correct. Further, I hereby voluntarily offer this information for the trial court's consideration:

During the jury deliberations in the above-styled case, jurors discussed the following matters:

1. The reason for the different names of Plaintiffs, and that they were Muslims;

2. Their own definition of the standard of care, which was used by the jury to reach its verdict;

APPENDIX "F-15"

3. The morality and reputation of the Plaintiffs' daughter, Quanetta Buchannon, to include that she had two children out of wedlock, and that she was probably went out of town to visit her boyfriend when she had her second child by an emergency delivery in Muscle Shoals;

4. Notes taken by the foreperson during the trial, which were used during deliberations;

5. Dr. Garrett's (Plaintiffs' expert) failure to correct Plaintiffs' counsel when she mistakenly called him Dr. Gerlach as disqualification for him being an expert;

6. Plaintiffs' counsel jewelry;

7. Discussions regarding Giddens violating the standard of care and the Hippocratic Oath, and regarding indicting Giddens; and a vote to indict him..

Further, Affiant saith naught.

_____

"s/JANE STUMP

SWORN TO and SUBSCRIBED BEFORE Me on this _____ day of February, 2000 at Scottsboro, Alabama, witness my hand and official Seal of office.

_____

"s/Notary Public
My commission expires:_____

APPENDIX "F-16"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

CHARLES SHARRIEF and	)
MILLIE SHARRIEF,	)
Personal Representatives of	)
QUANETTA M. BUCHANNON,	)
deceased,	)
	)
Plaintiffs,	)
	)
v.	)CIVIL
	)ACTION NO.
	)CV-94-327
	)
REBECCA GERLACH, M.D.,	)
	)
Defendant.	)

STATE OF ALABAMA	}	
	}	**AFFIDAVIT OF**
	}	**JAMES HEADRICK**
JACKSON COUNTY	}	

I, James Headrick, have personal knowledge of the following; and I hereby affirm that the same is true and correct. Further, I hereby voluntarily offer this information for the trial court's consideration:

During the jury deliberations in the above-styled case, jurors discussed the following:

1. The fact that the Plaintiffs were Muslims;
2. The jury's definition of the standard of care, which was the doctor is supposed

to do whatever he or she thought was necessary to keep the patient from further harm; and this definition was used by the jury to reach its verdict;

3. The morality and reputation of the Plaintiffs' daughter, Quanetta Buchannon, to include that she had two children out of wedlock;
4. Notes taken by the foreperson during the trial, which were used to reach a verdict;
5. Dr. Garrett's (Plaintiff's expert witness) failure to correct Plaintiff's counsel when she mistakenly called him Dr. Gerlach indicated that he was not an expert;
6. Discussions regarding Giddens violating the standard of care and the Hippocratic Oath, and regarding indicting Giddens; and a vote to indict him;
7. Discussions that Giddens could be sued and damages could be recovered from him.

_____

"s/James Headrick, Affiant

SWORN TO and SUBSCRIBED BEFORE ME on this _____ day of February, 2000, witness my hand and official Seal of office.

_____

"s/Notary Public
My commission expires:_____

APPENDIX "F-18"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

CHARLES SHARRIEF and	)	
MILLIE SHARRIEF,	)	
Personal Representatives of	)	
QUANETTA M. BUCHANNON,	)	
deceased,	)	
	)	
Plaintiffs,	)	
	)	
v.	)**CIVIL**	**ACTION NO.,**
	)**CV-94-327**	
	)	
REBECCA GERLACH, M.D.,	)	
	)	
Defendant.	)	

AFFIDAVIT

I, Charles Sharrief, have personal knowledge of the following, and I hereby affirm that the same is true and correct.

Subsequent to the trial of the above-styled case, I taped a conversation I had with one of the jurors, William Summers. I then provided the tape to my attorney, Sherryl Snodgrass Caffey. I hereby affirm that I provided the taped conversation in its entirety, and without any editing, additions or deletions of any nature.

"s/CHARLES SHARRIEF, Affiant

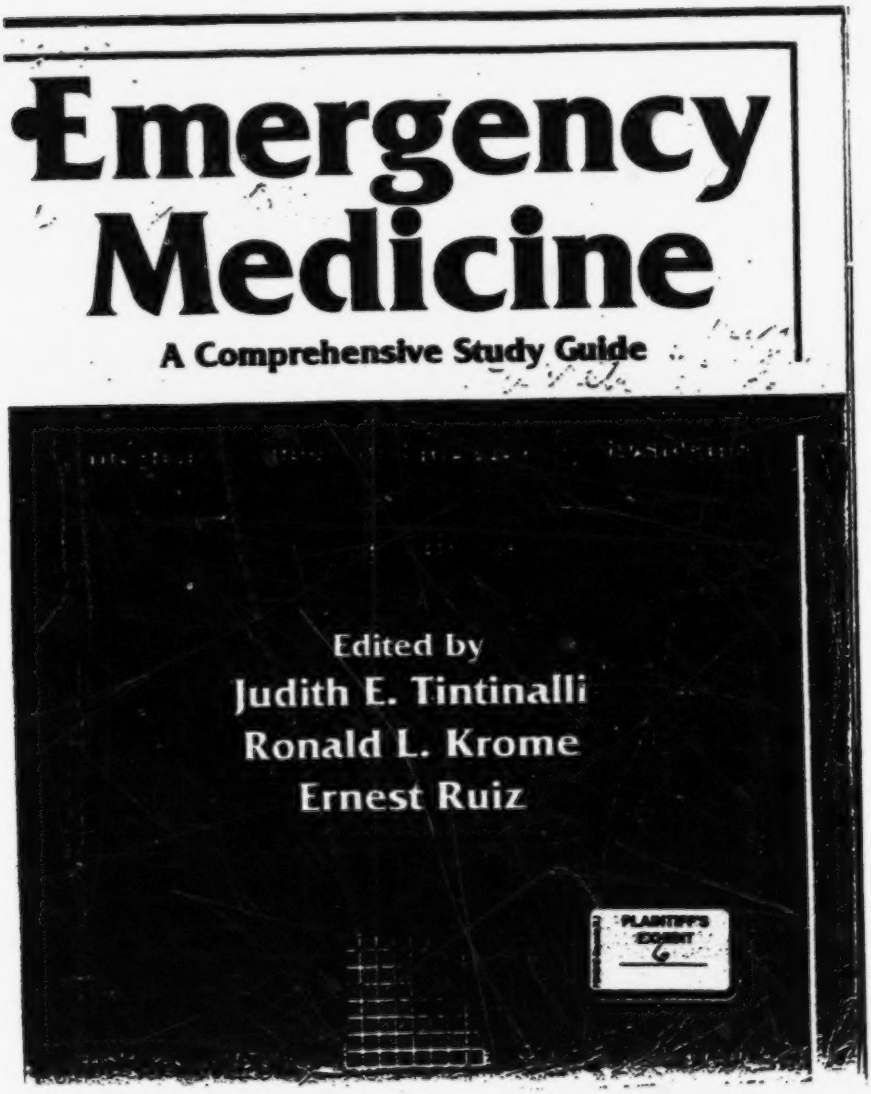
APPENDIX "F-19"

SWORN TO and SUBSCRIBED BEFORE ME on this_____ day of February, 2000 at Huntsville, Alabama, witness my hand and official Seal of office.

_____

"s/Notary Public
My Commission Expires:_____

APPENDIX "F-20"



Postpartum Fever

Fever in the postpartum period is common, and evaluation is similar to that of any febrile patient. The process of delivery can result in trauma and devitalization of the structures of the pelvis and urinary tract, creating an environment conducive to infection. In any postpartum patient, careful pelvic examination is necessary. The frequency of surgical infection following cesarean section varies between 5 to 45 percent in different populations. Episiotomy infections are uncommon, but when they occur they can be severe (e.g., necrotizing fasciitis). Urinary tract infection should be considered in any postpartum febrile patient.

Endometritis is characterized by the development of a boggy, tender uterus 1 to 3 days postpartum and is more common after abdominal delivery. Diagnosis is based on physical examination and exclusion of other causes of fever. A foul lochia is often found.

Hospitalization and intravenous therapy with broad-spectrum antibiotics with anaerobic coverage is recommended.

APPENDIX "G-1"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

CHARLES SHARRIEF and	)	
MILLIE SHARRIEF,	)	
Personal Representatives of	)	
QUANETTA M. BUCHANNON,	)	
deceased,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**CV-94-327**
	)	
REBECCA GERLACH, M.D.,	)	
	)	
Defendant.	)	

Jury Verdict

We, the Jury, find for the defendant.

_____

"s/FOREPERSON

APPENDIX "G-2"

STATE OF ALABAMA) IN THE CIRCUIT COURT
)
JACKSON COUNTY) CASE NO. CV-94-327

CHARLES SHARRIEF and
MILLIE SHARRIEF,
as co-administrators for the Estate
of QUANETTA M. BUCHANNON,
deceased.....PLAINTIFFS

VS.

REBECCA GERLACH, M.D.....Defendant

JURY JUDGMENT

The duly empaneled jury in this cause returned the following verdict on January 27, 2000:

"We, the Jury, find for the defendant."

The Jury Verdict was signed by Ronny Whitaker as foreperson.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

That judgment is entered in favor of the defendant, Rebecca L. Gerlach, M.D., and the plaintiffs, Charles Sharrief and Millie Sharrief, as co-administrators of the Estate of Quanetta M. Buchannon, deceased, shall recover nothing from the defendant.

Done this 31st day of January, 2000.

"s/JENIFER C. HOLT
Circuit Judge

APPENDIX "H-1"

STANDARD OF CARE	GARRETT	SQUIRES	GERLACH
Consider/report presentment hist			
Gerlach did not report all of presentment history to Giddens		R 368-370	R 31, 61, 69-71
Make appropriate examinations			
Gerlach did not do speculum exam	R 203-204	R 374	R 36-40
Gerlach did not determine color and odor of lochia	R 192	R 372-373	R 33-35
Order appropriate tests and retestabnormalities			
Gerlach did not order electrolytes	R 215-216		
Gerlach did not order fecal leukocytes			
Gerlach didn't retest abnormal findings			
CBC -2 segs, 77% bands	R 194, 197, 199	R 365, 367	R 49-50, 87
Urinalyses specific gravity 1.30	R 194-195, R 199	R 262 R 375-376	R ,126,129 R 60-61, 71, 92
Vitals	R 190-191	R 357	
Negative bowel sounds	R 188, 204, 205		R 31
Consider/report abnormal findings			
Gerlach did not report abnormalities	R 190-191	R 365, 367-368	R 71, 83
Consider and report positives & negatives			
Gerlach didn't consider/report + & -		R 367-368	R 83

APPENDIX "H-2"

Quantify findings Gerlach did not quantify findings Re: vomiting and diarrhea	R 214		R 32-33
Administer appropriate medications Proper Med.= IV broad spectrum antibiotic with anaerobic coverage and IV fluids	R 199-200, 202	R 369-370	R 53, 56-57
Gerlach's Rocephin shot was improper because it did not have anaerobic coverage, and it peaked too fast	R 211-213	R 370-372	R 59
Gerlach's Doxycycline prescription could not be filled until next day; was improper due to history of vomiting; and was an inadequate dosage	R 211-214		R 69-71
Gerlach did not hydrate with IV fluids	R 214		R 136
Make correct diagnosis Gerlach's diagnosis of Endometritis was incorrect because Quanetta's infection extended beyond uterus	R 193, 208	R 364, 367	R 57-58, 61

APPENDIX "H-3"

Consult with another physician when appropriate and give him/her presentment history, examination results, tests results, positives & negatives, and abnormal findings		R 368-370	
Gerlach did not give Giddens the aforesaid required information			R 69-71, 79, 92-93
Gerlach didn't consult with Giddens, she merely asked Giddens to follow-up after discharge.		R 382, 384	R 61, 63-64, 67, 69-71, 101
Giddens' instruction to follow up with Dr. Gapultos complied with Alabama's Board of Medical Examinations policies & rules.		R 380-381	R 69-71, 140
Evaluate, Stabilize & Treat Patient		R 355,364,367	R 40, 57-58, 61
Gerlach's diagnosis was incorrect	R 193, 199, 208		R 58, 69-71
Gerlach's medication was incorrect	R 210, 212-213	R 370-372 R 379-380	R 57-58, 61
Gerlach's discharge was improper	R 214		
Quanetta's condition continued to deteriorate after discharge, causing her death from septic shock See also Death Certificate C 518 See also Autopsy Report C 507	R 207-208	R 354, 390	R 41-42, 112-113

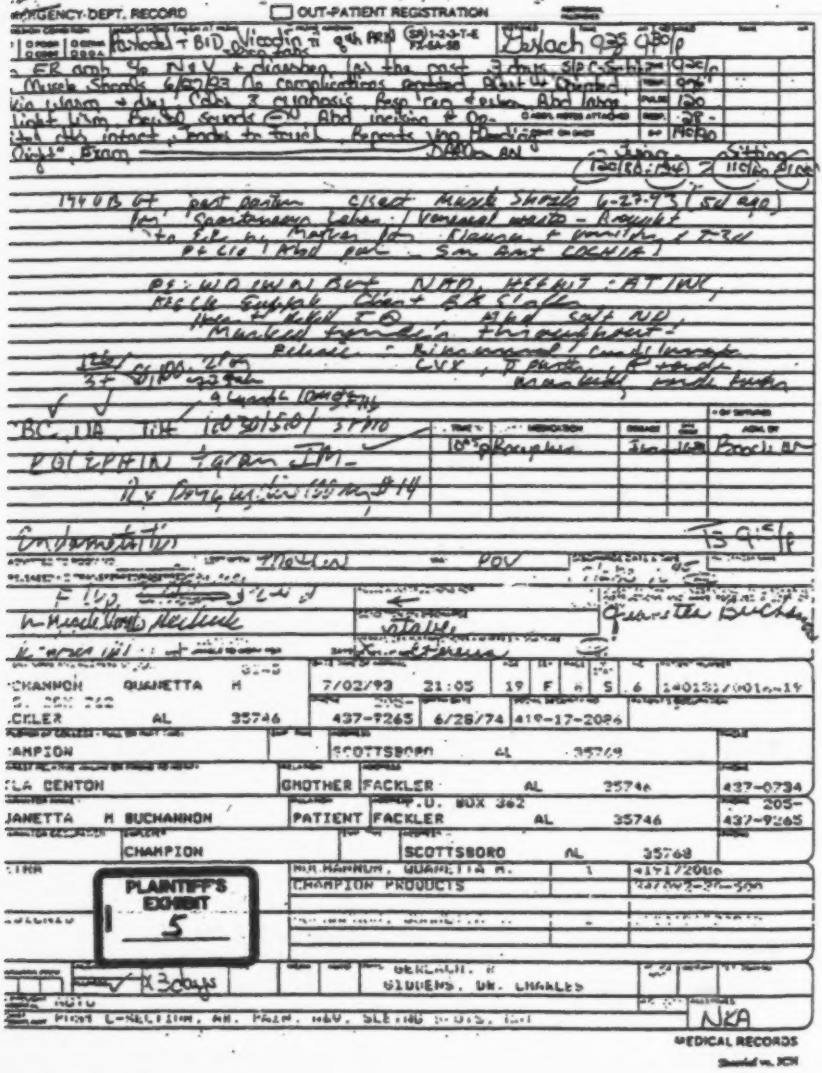
APPENDIX "H-4"

Determine whether to admit patient and ensure admission, when appropriate		R 359, 367-368	R 136
Standard of Care for even endometritis required hospitalization and broad spectrum IV antibiotics with anaerobic coverage	R 193, 199-200, 202, 208, 214	R 369-370	R 53, 56-57
See also Treatise C 473			
Gerlach was responsible for Quanetta while she was in ER		R 359, 367-368	R 124
Gerlach's discharge of Quanetta was improper	R 202, 214		R 57-58
Gerlach's options for admitting Quanetta, assuming Giddens refused to admit her:	R 219-220	R 386	R 124-125
1. Keep & treat in ER	R 219		R 124-125
2. Find cooperative admitting Dr.	R 219		R 62, 124-125
3. Obtain admission through the Hospital Administrator.	R 219		R 124-125
4. Transfer by ambulance to Helen Keller hospital & Dr. Gapultos	R 219, 220		R 124-125

APPENDIX "H-5"

Gerlach's aforesaid breaches of the standard of care proximately caused and/or contributed to Quanetta's death · Quanetta's medical condition evolved from endometritis to peritonitis to sepsis to cardiovascular collapse to death	R 207-208	R 354, 390	R 112-113
Garrett, Squires & Gerlach have treated hundreds/ thousands of patients with endometritis and peritonitis, and some with sepsis, and none have died. NOTE: Giddens testified that he had treated 1,250 patients with endometritis, 300-400 with peritonitis and 5 patients with septic shock or sepsis, and none of them died. R 301-303	R 217, 246-247	R 354	

APPENDIX "I"



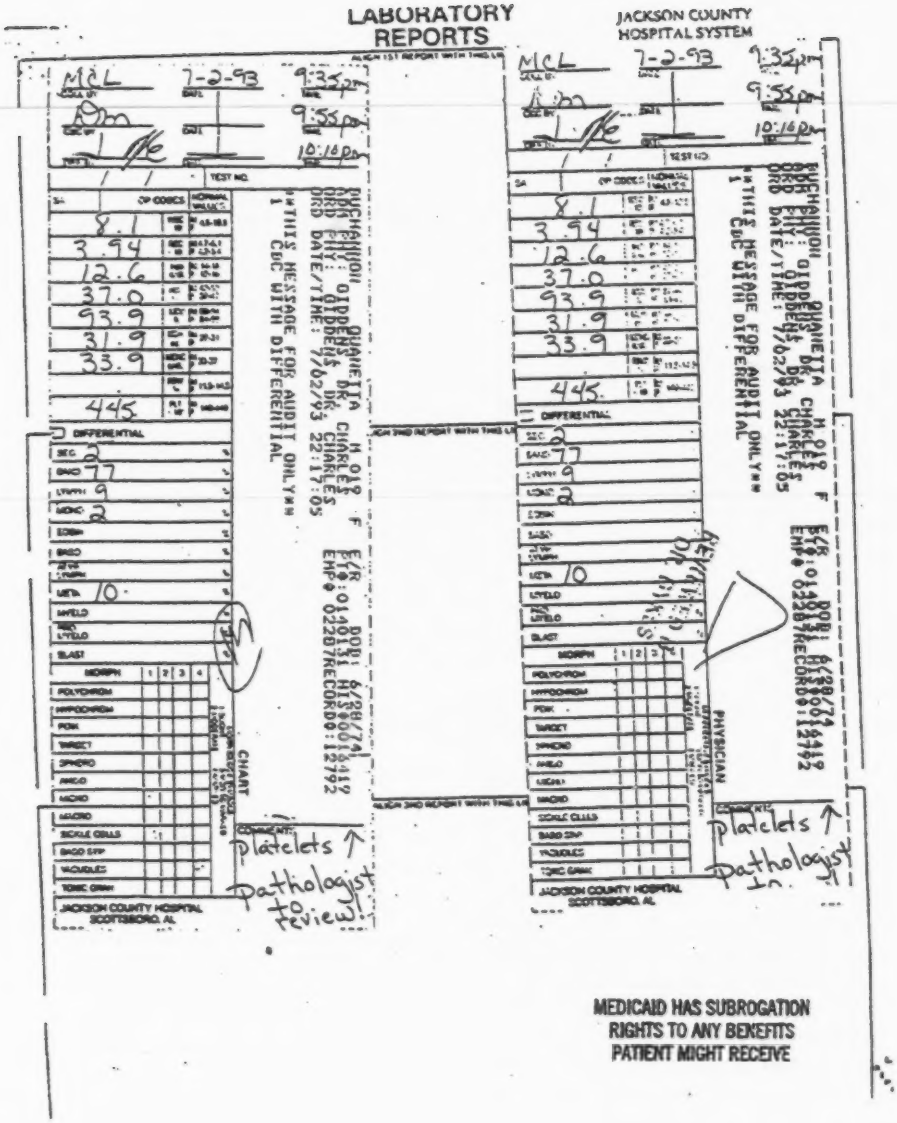
EMERGENCY DEPT. RECORD

OUT-PATIENT REGISTRATION

PLAINTIFF'S EXHIBIT 5

MEDICAL RECORDS

BEST AVAILABLE COPY


LABORATORY REPORTS
JACKSON COUNTY HOSPITAL SYSTEM
MCL
7-2-93
9:35a
9:55a
10:16a
8.1
3.94
12.6
37.0
93.9
31.9
33.9
445
DIFFERENTIAL
77
9
2
10
"THIS MESSAGE FOR AUDIT ONLY"
CHARLES
E/R: 01490181
EMP# 0228
RECORD: 112492
PHYSICIAN
Platelets ↑
Pathologist to review
JACKSON COUNTY HOSPITAL
SCOTTSBORO, AL
MEDICAID HAS SUBROGATION
RIGHTS TO ANY BENEFITS
PATIENT MIGHT RECEIVE

URINALYSIS WITH MICRO

COLOR..gold...
APPEAR..cloudy
GLUCOSE.....
BILIRUBIN.....
KETONE.....
SP GR 1.030...
BLOOD 3+.....
PH..5.0.....
PROTEIN.3+....
UROBILINOGEN N..
NITRITE.....
LEUKOCYTES.....

RBC:5..10../HPF
WBC:...../HPF
CAST...../PF
EPITH(SQ)../HPF
CRYSTALS.....
BACTERIA.3+..../HPF
MUCUS...../HPF
PHOSPHATES...../HPF

LABORATORY REPORTS

JACKSON COUNTY HOSPITAL SYSTEM

CHART

BUCHANNON QUANETTA n 019 F E/R DOB: 6/28/74
ADM PHY:GIDDENS, DR. CHARLES PT#:0140131 HIS#0016419
ORD PHY:GERLACH, DR. REBECCA . EMP#02272 ORDER #:12703
ORD DATE/TIME: 7/02/93 21:26:03

URINALYSIS WITH MICRO
COLOR..gold...
APPEAR.cloudy
GLUCOSE.....
BILIRUBIN.....
KETONE.....
SP GR 1.030...
BLOOD 3+.....
PH..5.0.....
PROTEIN.3+....
UROBILINOGEN N..
NITRITE.....
LEUKOCYTES.....

RBC:5..10../HPF
WBC:...../HPF
CAST...../PF
EPITH(SQ)../HPF
CRYSTALS.....
BACTERIA.3+..../HPF
MUCUS...../HPF
PHOSPHATES...../HPF

URATES...1+.../HPF
COMMENTS.....
.....
.....
TECH..RN
DATE....7-2-93
TIME....9:56 pm

URINALYSIS WITH MICRO
JACKSON COUNTY HOSPITAL 4022047
** BROUGHT TO LAB (DATE & TIME).....

ALIGN 2ND REPORT WITH THIS LINE

MEDICAID HAS SUBROGATION RIGHTS TO ANY BENEFITS PATIENT MIGHT RECEIVE

LAB

APPENDIX "J"

TABLE 1
Ceftriaxone Plasma Concentrations After Single Dose Administration

Dose/Route	Average Plasma Concentrations (mcg/ml)								
	0.5 hr	1 hr	2 hr	4 hr	6 hr	8 hr	12 hr	16 hr	24 hr
0.5 gm I.V.*	82	39	48	37	29	23	15	10	5
0.5 gm I.M.	30	41	43	39	31	25	16	ND†	ND
1 gm I.V.*	181	111	88	67	53	43	28	18	9
1 gm I.M.	40	68	76	68	56	44	29	ND	ND
2 gm I.V.*	257	192	154	117	89	74	46	31	15

* I.V. doses were infused at a constant rate over 30 minutes.
† ND = Not determined.



TABLE 1
Ceftriaxone Plasma Concentrations After Single Dose Administration

Dose/Route	Average Plasma Concentrations (mcg/ml)								
	0.5 hr	1 hr	2 hr	4 hr	6 hr	8 hr	12 hr	16 hr	24 hr
0.5 gm I.V.*	82	39	48	37	29	23	15	10	5
0.5 gm I.M.	30	41	43	39	31	25	16	ND†	ND
1 gm I.V.*	181	111	88	67	53	43	28	18	9
1 gm I.M.	40	68	76	68	56	44	29	ND	ND
2 gm I.V.*	257	192	154	117	89	74	46	31	15

* I.V. doses were infused at a constant rate over 30 minutes.
† ND = Not determined.

TABLE 2
Urinary Concentrations of Ceftriaxone After Single Dose Administration

	Average Urinary Concentrations (mcg/ml)					
	0-2 hr	2-4 hr	4-8 hr	8-12 hr	12-24 hr	24-48 hr
	556	383	142	67	19	15
	115	468	218	137	36	24
	955	855	288	147	135	60
	854	858	418	257	ND†	ND
	2663	1574	787	378	198	40

PLAINTIFF'S EXHIBIT

Aug 27 2001

(7)

No. 01-159

Supreme Court, U.S.
FILED
AUG 27 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHARLES AND MILLILE SHARRIEF
Personal Representatives for
Quanetta Buchannon, Deceased,

Petitioners,

v.

REBECCA GERLACH, M.D.

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION

JOHN S. KEY
Counsel of Record
JENNY L. MCLEROY
EYSTER, KEY, TUBB, WEAVER
& ROTH
Post Office Box 1607
Decatur, Alabama 35602
(256) 353-6761

Counsel for Respondents

18 pp

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The "List of Parties" set forth in the Petition at page ii adequately identifies all relevant parties to this proceeding.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Reasons for Denying the Writ 1

I. Plaintiffs' present constitutional challenges to the decision of the Alabama Supreme Court, affirming the trial court's denial of several post trial motions seeking discovery regarding the jury's deliberations, were not preserved for review by this Court. 1

II. Petitioners have at no point made, much less preserved, any federal challenge to the racial makeup of the jury venire. 6

III. Petitioners have failed to offer any compelling reason pursuant to Rule 10 of the Rules of the United States Supreme Court for the granting of this Petition. 7

Conclusion 8

TABLE OF CITED AUTHORITIES

Cases: *Page*

Adams v. Robertson, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed.2d 203, 208 (1997) . . . 2-4, 7

Board of Directors of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed.2d 474 (1987) 2

Haitian Refugee Center, Inc. v. Baker, III, 502 U.S. 1122, 112 S. Ct.1245, 117 L. Ed.2d 477 (1992) . . 7

Hathorn v. Lovorn, 457 U.S. 255, 262-265, 102 S. Ct. 2421, 2426-2428, 72 L. Ed.2d 824 (1982) 4

Lear, Inc. v. Adkins, 395 U.S. 653, 675, 89 S. Ct. 1902, 1913, 23 L. Ed.2d 610 (1969) 2-3, 7

Webb v. Webb, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed.2d 392 (1981) 2

REASONS FOR DENYING THE WRIT

To the extent that Petitioners have set forth United States Constitutional challenges to the opinion of the Alabama Supreme Court styled *Charles Sharrief and Millie Sharrief as personal representatives of Quanetta M. Buchannon, deceased v. Rebecca Gerlach, M.D.* and identified as Case Number 199172, such challenges were not presented to, nor ruled upon by, the Alabama Supreme Court and, therefore, have not been preserved for review by this honorable Court, as shown more specifically below.[1]

I.

Plaintiffs' present constitutional challenges to the decision of the Alabama Supreme Court, affirming the trial court's denial of several post trial motions seeking discovery regarding the jury's deliberations, were not preserved for review by this Court.

With very rare exceptions, the United States Supreme Court has adhered to the rule, adopted pursuant to 28 U.S.C. § 1257(a) (1993), that a federal claim, presented upon petition for writ of certiorari, will not be reviewed unless it was either addressed by, or properly presented to, the state court that

---

[1] At the outset of their Petition for Writ of Certiorari, in their "Questions Presented", specifically "Questions" 1(B), 2, and 4, Petitioners set forth several issues which clearly involve only matters related to Alabama state law and which in no way implicate any right guaranteed to the Petitioners under any federal constitutional or statutory authority. Therefore, this Court lacks authority to hear such claims. 28 U.S.C. § 1257 (1993).

rendered the decision the review of which is sought. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed.2d 203, 208 (1997). The issue presented for review upon petition for writ of certiorari to this Court must have been presented to the highest state court in such a manner that it was necessarily decided by such state court in order for review by the United States Supreme Court to be proper. *Lear, Inc. v. Adkins*, 395 U.S. 653, 675, 89 S. Ct. 1902, 1913, 23 L. Ed.2d 610 (1969). Moreover, when the highest court's opinion is silent on the federal question sought to be reviewed, the United States Supreme Court will assume that the issue was not properly presented, *Adams*, 520 U.S. at 86, 87, (citing *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed.2d 474 (1987)). The aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question sought to be reviewed. *Adams*, 520 U.S. at 87, (quoting *Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed.2d 392 (1981)).

To the extent the Petitioner has set forth United States Constitutional challenges to the decision of the Alabama Supreme Court affirming the trial court's denial of several post trial motions seeking discovery regarding the jury's deliberations, such challenges are not properly before this Court because they were neither presented to, nor ruled upon by, the Alabama Supreme Court. Specifically, Petitioners seek to challenge that portion of the Alabama Supreme Court's decision affirming the trial court's denial of post trial discovery and the striking of several affidavits regarding jury deliberations by alleging for the first time before this Court that those

decisions violate their right to a fair and impartial jury as guaranteed by the 1st, 6th, and 7th Amendments to the United States Constitution and their right to due process and equal protection as guaranteed by the 5th and 14 Amendments.[2] However, Petitioners have not shown that any such challenges, or citations to authority supporting the same, were submitted to the Alabama Supreme Court for review upon the Petitioners' appeal to that court.[3] Moreover, the opinion of the Alabama Supreme Court contains no discussion of any United States Constitutional issue related to the denial of Petitioner's post trial motions seeking discovery regarding the jury's deliberations. (See Pet. App. A, at A-6 - A-11).

Because the Alabama Supreme Court was not presented with the United States Constitutional and 42 U.S.C. § 1983 challenges as alleged in the present Petition, such challenges cannot provide the basis for this Court's review of the Alabama court's opinion. *Adams* and *Lear, Inc., supra.*[4]

2

In their list of "Constitutional and Statutory Provisions Involved", on page 3 of their Petition, Petitioners list 42 U.S.C. § 1983 as "involved" in this matter. However, no challenge pursuant to this statute was presented to the Alabama Supreme Court upon appeal, and Petitioners have not cited to any authority or made any argument regarding how said statute is implicated in their present Petition.

3

Petitioners have not submitted by Appendix, or otherwise, their Appellant's Brief to the Alabama Supreme Court which sets forth their claims of errors and supporting arguments on appeal.

4

Respondent notes that Petitioners have failed to even cite in their Petition to this Court relevant authority which specifically purports to demonstrate how the decision of the Alabama Supreme Court runs afoul of any United States Constitutionally or statutorily

Although the U.S. Constitutional challenges set forth in this Petition were not preserved for review by this Court, without waiver of this issue, Respondent would briefly note that the Alabama Supreme Court's decision(s) regarding the denial of post trial discovery and the striking of several affidavits regarding the jury's deliberations does not violate any right of the Petitioners guaranteed by the United States Constitution and is in accordance with both federal and state authority regarding the admission of such evidence.

Initially, the Court should note that the trial court's decisions regarding Petitioners post trial attempts to obtain testimony from jurors regarding their deliberations, was, under Rules 27 and 30 of the Alabama Rules of Civil Procedure, subject to review pursuant to an abuse of discretion standard as indicated by the Alabama Supreme Court in its opinion. (Pet. App. A, at A-6, A-7). The Alabama Supreme Court affirmed the trial court's quashing of Petitioner's post trial motion to issue subpoenas to the jurors on the basis that the Petitioners had failed to comply with Rule 27 of the Alabama Rules of Civil Procedure in that they had failed to file any motion with the court for authorization to take such depositions. Petitioners have not shown how the procedural requirements of Rule 27 Ala.R.Civ.P. could not serve as an independent and adequate state law ground sufficient to uphold the Alabama Supreme Court's decision regarding the same. See *Adams*, 520 U.S. at

---

protected right. While the Petitioners have, briefly, cited federal precedent for the boilerplate existence of the right allegedly violated, they have not provided citation to any authority to demonstrate *how* such right was allegedly violated by virtue of the Alabama Supreme Court's opinion.

87, (citing *Hathorn v. Lovorn*, 457 U.S. 255, 262-265, 102 S. Ct. 2421, 2426-2428, 72 L. Ed.2d 824 (1982)).

As noted in the Alabama Supreme Court's opinion, all of the Petitioners' arguments concerning post trial discovery regarding the jury's deliberations were based on three affidavits which were obtained prior to the trial court's quashing of the subpoenas seeking to depose the jurors. (Pet. App. A, at A-7, A-8). Those affidavits included that of Charles Sharrief, Plaintiff below and Petitioner herein, and two jurors. The affidavit of Charles Sharrief consisted, in its substantive entirety, of a list of statements allegedly made to him by jurors after the trial. (Pet. App. A, at A-8). The trial court struck the Affidavit of Charles Sharrief on the basis that it was comprised entirely of "hearsay" as defined under Rule 802 of the Alabama Rules of Evidence. (Pet. App. A, at A-8). Upon appeal, the Petitioners did not challenge by citation to any authority, the propriety of the court's order striking the affidavit of Sharrief on this basis and the Alabama Supreme Court affirmed the same. (Pet. App. A, at A-8).

In addition, the trial court struck the affidavits of the two jurors submitted by Petitioners in support of their post trial discovery motions on the grounds that the substantive testimony contained therein was not properly admissible to impeach the jury's verdict under Rule 606 of the Alabama Rules of Evidence which is, as the Alabama court noted, substantively similar to its federal counterpart. (Pet. App. at A-7 - A-11). In reaching its decision affirming the striking of these affidavits pursuant to Rule 606, Ala. R. Evid, the Alabama court cited federal opinions from the 7th, 2nd, and 5th Circuits, each interpreting Rule 606(b) of the Federal Rules of

Evidence.[5] Petitioners have not shown by citation to any authority how the Alabama Supreme Court's interpretation and application of Rule 606 of the Alabama Rules of Evidence runs afoul of any United States Constitutional Amendment or right of the Petitioners guaranteed thereunder.

II.

Petitioners have at no point made, much less preserved, any federal challenge to the racial makeup of the jury venire.

Petitioners maintain in their Petition at page 5 that "At the trial of this matter, the Sharriefs timely raised a *Batson*

5

In its opinion, the Alabama Supreme Court stated:

> In Peveto v. Sears, Roebuck & Co., 807 F.2d 486, 489 (5th Cir. 1987), the United States Court of Appeals for the Fifth Circuit held that "by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation." The Seventh Circuit has held that Rule 606(b) is designed "to protect the judicial process from efforts to undermine verdicts by scrutinizing the jurors' thoughts and deliberations." United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988). Other courts of appeals for the federal circuits have stated that Rule 606(b) promotes "free and uninhibited discourse during deliberations." Attridge v. Cencorp Div. of Dover Techs. Int'l., Inc. 836 F.2d 113, 116 (2d Cir. 1987); Maldonado v. Missouri Pac. Ry., 798 F.2d 764 (5th Cir. 1986).

(Pet. App. A, at A-9).

objection to the jury venire containing one African American out of 36 veniremen" and that "their case was ultimately tried to an all white jury." However, the Alabama Supreme Court in its opinion maintained that it had found no objection to the composition of the jury or a *Batson* objection to the striking of the one black member of the venire in the record. (Pet. App. A, at A-11).[6] Therefore, because Petitioners' present federal challenges to the racial makeup of the jury venire were not presented to the Alabama Supreme Court for review and were not addressed by said court, they are not properly before this honorable Court for review. *Adams* and *Lear, Inc., supra.*

III.

Petitioners have failed to offer any compelling reason pursuant to Rule 10 of the Rules of the United States Supreme Court for the granting of this Petition.

The Petitioners have not set forth any compelling reason for the granting of a writ for certiorari to the Alabama Supreme Court as generally required and described in this

---

[6] In its opinion, the Alabama Court quoted extensively from the record regarding a purported *Batson* challenge made by the Petitioners challenging the Respondent's use of seven of ten of its peremptory strikes to remove women from the panel, leaving three women on the jury. Nothing in this exchange remotely indicates any *Batson* challenge to the racial makeup of the jury venire. (Pet. App. A, at A-13 - A-15). Moreover, Petitioners have not presently sought review by this Court of the Alabama Court's ruling affirming the trial court's finding that the Petitioners failed to present a prima facie case of improper peremptory strikes on the basis of gender. (Pet. App. A, at A-15, A-16).

Court's Rule 10 and, consequently, this Petition is due to be denied. See *Haitian Refugee Center, Inc. v. Baker*, 502 U.S. 1122, 112 S. Ct. 1245, 117 L. Ed.2d 477 (1992) (mem.) (Thomas, J. regarding the denial of certiorari).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,
JOHN S. KEY
Counsel of Record
JENNY L. MCLEROY
EYSTER, KEY, TUBB, WEAVER & ROTH
Post Office Box 1607
Decatur, Alabama 35602
(256) 353-6761